85-450

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

—o—

(Ninth Circuit No. 84-1062)

ANTHONY JAMES BRIDGEPORT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR CERTIORARI TO REVIEW DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

LAW OFFICE OF ALEX A. GAYNES
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Date of Mailing: September 11, 1985

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QUESTIONS PRESENTED

The question presented is: Whether Anthony James Bridgeport's rights to due process were violated when prejudicial irrelevant material was elicited, including the following:

1. At least two separate references attempting to link Mr. Bridgeport with the Japanese mafia.

2. Presentation of witness testimony involving sexual relations between Mr. Bridgeport, a black man, and a white woman.

3. When the rule against exclusion of witnesses was clearly breached.

4. When the prosecution continually vouched for witnesses.

5. When an individual not present at trial was termed a "fugitive".

6. When the prosecution "cleaned up" a statement made by a witness for the purpose of deluding the Grand Jury.

7. When the prosecution asked the jury to speculate about other crimes?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Anthony James Bridgeport, Petitioner herein, prays that a Writ of Certiorari issue to review the Opinion of the Ninth Circuit dated April 19, 1985, and the Order of the Ninth Circuit, denying Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc, dated July 30, 1985.

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OPINIONS OF THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reproduced in Appendix A. The denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc is reproduced in Appendix B.

———o———

STATEMENT OF THE CASE

Anthony James Bridgeport was indicted along with Charles Gipson, Moses Thomas, Thomas Michael Price, Sharkey Wright, Jr., Jim Davis, Jr., and Ernest Gentry. Mr. Bridgeport was charged with the following:

1. Conspiracy to violate Federal law concerning the sale of firearms to Japan without first obtaining an export license.

2. Counts Two and Three dealt with specific substantive counts involving specific weapons.

3. Count Four and Count Five dealt with false writings or documents allegedly causing the return of money previously seized by the United States Customs Service.

4. Count Six alleged engaging in the business of dealing in firearms without a license.

The trial commenced on January 5, 1984, against Anthony James Bridgeport, Jim Davis, Jr., and Ernest Gentry. Named Defendants Gipson, Thomas, and Price testified on behalf of the prosecution pursuant to "deals". Named Defendant, Sharkey Wright, Jr., according to the Opening Statement of the United States Attorney ". . . is not on trial. We don't know where he is." (RT. 26).

At trial, Mr. Gentry who was named only in Count One was acquitted. Jim Davis, Jr., who was named in Counts One and Six, was convicted of both counts, and Mr. Bridgeport who was named in all six counts, was convicted of each count.

Mr. Bridgeport is on bond pending appeal, though he has spent approximately five months incarcerated for failure to testify in front of the same Grand Jury which indicted him. Upon expiration of that Grand Jury term, Mr. Bridgeport was subpoenaed to Washington, D.C. to testify in front of the President's Commission on Organized Crime. Timely Notice of Appeal was filed by Mr. Bridgeport. On appeal the matter was consolidated with the case involving Jim Davis, Jr.

Mr. Bridgeport has been allowed to proceed in forma pauperis, though his counsel will be requesting or asserting no compensation.

The Court of Appeals upheld the convictions on each of the counts. Mr. Bridgeport, through his attorney, filed a Petition for Rehearing and Suggestion for Rehearing en banc.

The Petition for Rehearing was denied on the 30th day of July, 1985. The decision denying the Petition for Rehearing was the last substantive matter pending in front of the Ninth Circuit.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

———o———

STATEMENT OF FACTS

It was the position of the prosecution that Mr. Bridgeport spearheaded the purchase of firearms in Arizona by personally purchasing weapons, having others purchase weapons, thereupon transporting the weapons in luggage via military aircraft from Travis Air Force Base in California to Yakota Air Force Base in Japan.

The primary testimony concerning the alleged conspiracy came from three co-conspirators who were given various forms of immunity from prosecution.

The first immunized witness, Mr. Owens, who had previously given contrary statements, attempted to gratuitously link Mr. Bridgeport to a man named Yamata who according to the witness was "the son of the — Osaka Yakusa; which is like Japanese mafia; organized crime." This same witness threw in gratuitous references to marijuana and drug use. These matters were irrelevant to the case, and were not necessary. However, the addition of these items to the case added significant prejudicial error. Not content with leaving this error aside, the prosecution called a witness to translate some Japanese. As part of this witness' testimony questions were asked concerning the Yakusa and Japanese organized crime.

Owens also testified in front of the Grand Jury. A doctored statement was provided for him and submitted to the Grand Jury leaving out previous inconsistent statements. According to the witness this was done because he "wanted to say the right thing for the Grand Jury." RT. 160, 11. 19-20.

The other immunized witnesses paraded in front of the Jury with the United States Attorney vouching for their testimony.

As each witness ended the testimony, the testimony would go something like this:

"Q. Now, in return for that, what did you agree to do?

A. To testify truthfully.

Q. And is that why you're here as a witness?

A. Yes, it is."

RT. 456, 11. 21-25.

The prosecution also called a young woman named Laurie Hudgins, who was white, and had her testify concerning relations with Mr. Bridgeport, who is black.

Every form of prejudicial issue was entered into evidence in this case. Sex, race, drugs, doctored statements, and immunity put together, constituted a violation of due process.

———o———

ARGUMENT

I.

Each of the prejudicial incidents which occurred during trial stripped Mr. Bridgeport of some of his due process protections.

For example, the constant vouching by the United States Attorney for the credibility of the witnesses eroded Mr. Bridgeport's right to be presumed innocent. When a prosecution by action, words, or deeds "vouches" for the credibility of witnesses, the conduct is prejudicial, and should not be allowed. See for example, *U.S. v. Young,* 736 F.2d 565, 569 (10th Cir., 1983); *U.S. v. Rios,* 611 F.2d 1335 (10th Cir., 1979); *U.S. v. Lattimer,* 511 F.2d 498 (10th Cir., 1975); *U.S. v. Coppola,* 479 F.2d 1153 (10th Cir., 1973); *U.S. v. Ludwig,* 508 F.2d 140 (10th Cir., 1979).

This is because in our system of justice the United States Attorney plays an xtraordinary part. As the Supreme Court noted in *Berger v. U.S.,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed.2d 1314 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all — and whose interests, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law . . ."

The erosion of the presumption of innocence and Mr. Bridgeport's due process rights accelerated through the trial. Evidence of previous statements admitted into evidence included references to the Japanese mafia, as did two separate solicited references to the Japanese mafia.

For the second instance, the United States Attorney's Office even called an individual tendered through to the jury as an "expert".

This behavior in and of itself has been called prejudicial. In the case of *U.S. v. Love,* 534 F.2d 87 (6th Cir., 1976), a question (not answer) asked that the National Accounting System was part of another organization of "ill-character like mafia or anything like that" . . . The Court found that this question alone injected a highly prejudicial item into the case. The Court attempted to neutralize the comment, but the case was reversed.

The references to the mafia in Mr. Bridgeport's case could not have been cured. Mr. Bridgeport's conviction must be reversed.

In the case of *U.S. v. Perry,* 512 F.2d 805, 807 (6th Cir., 1975), just the act of the U.S. Attorney in asking a defendant whether he was a member of "what is called the Dixie mafia out in East Ridge" was sufficient enough for that Court to admonish the U.S. Attorney noting that:

> "The U.S. Attorney should have been well aware of the legal irrelevance and prejudicial effect of this question." 512 F.2d at 807.

See also, *U.S. v. Paoli,* 603 F.2d 1029, cert. den. 444 U.S. 926, 100 S.Ct. 264, 62 L.Ed. 2d 182 (Court of Appeals, N.Y., 1979).

The references to Japanese mafia which had nothing to do with the case at bar added nothing but pure, unadulterated prejudice.

Additionally, prejudicial joinder occurred in the case to Mr. Bridgeport's detriment. The conspiracy involving

weapons, and the substantive offenses related thereto, were joined for the purposes of trial with allegations of telling untrue statements to Customs officials concerning money (not weapons). The joinder was improper, and the prejudice incalculable. The misjoinder also allowed the prosecutor to speculate concerning the source of funds which had been taken from Mr. Bridgeport by Customs when the prosecutor told the jury:

> "You can well imagine what the source of those funds were" ... RT. 991, 11. 19-20.

To insinuate, or infer other crimes, or to ask the jury to speculate concerning other crimes, and sources of funds is reversible error. See *U.S. v. Laberbera,* 581 F.2d 107 (5th Cir., 1978), *Dunn v. U.S.,* 307 F.2d 883 (5th Cir., 1962).

In addition, gratuitous insulting prejudicial comments made concerned marijuana smoking, living with a woman who was not Mr. Bridgeport's wife and who was of a different race, reference to drugs, and huge sums of money. When these items coupled together, it is clear Mr. Bridgeport was denied any semblance of due process. Anyone of these defects alone was sufficient.

During the course of the trial, the main witness, Mr. Owens, and another of the witnesses, consistently conversed and talked about the case refreshing each other's recollection despite the fact that the Court had invoked the rule. The Trial Court found an actual violation of the rule by the prosecution's witnesses. The Court noted:

> "As to your motion on the rule—violation of the rule—I am concerned—I am very concerned about the fact that a violation took place ... "

This violation acted as one more impediment to a fair trial for Mr. Bridgeport.

The cumulative effect of all cries for this Court to set the limits of prosecutorial behavior injecting into a case prejudicial matters irrelevant to the proceedings introduced just for the purpose of eroding the individual's due process protections.

RESPECTFULLY SUBMITTED this 11th day of September, 1985.

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1049
DC No. CR 83-230-TUC-RMB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIM DAVIS, JR.,

Defendant-Appellant.

No. 84-1062
DC No. CR 83-230-TUC-RMB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY JAMES BRIDGEPORT

Defendant-Appellant.

MEMORANDUM*

(Filed April 19, 1985)

Appeal from the United States District Court
for the District of Arizona

Hon. Richard M. Bilby, Presiding

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter,* and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Argued and Submitted, January 16, 1985

Before: FLETCHER, BOOCHEVER, and NORRIS, Circuit Judges.

Davis and Bridgeport appeal their convictions on multiple counts arising out of a conspiracy to smuggle guns from the United States to Japan. Each now assigns numerous alleged errors at trial. We affirm the convictions of both Bridgeport and Davis on all counts.

The Conviction of Jim Davis

Davis argues that his conviction should be reversed for a variety of reasons. First, he alleges that the trial court erred in denying his motion to sever. Davis's assertion that there was more evidence or more damaging evidence against his co-defendants, while properly considered by the trial judge as a factor in making the decision whether or not to sever, does not entitle him to a reversal of the trial court's decision. Davis has not demonstrated that failure to sever was "so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." *United States v. Kenny,* 645 F.2d 1323, 1345 (9th Cir.), *cert. denied,* 452 U.S. 920 (1981). Davis also claims that he was entitled to a severance under the Sixth Amendment Confrontation Clause. Under the standards enunciated in *United States v. Perez,* 658 F.2d 654, 660-61 (9th Cir. 1981), no violation occured: first, Bridgeport was unavailable—he had a Fifth Amendment privilege—and, second, his testimony was reliable—he spoke from personal knowledge about ongoing activities with no incentive to misrepresent Davis's involvement at the time.

Davis also appeals the denial of a directed verdict of acquittal, but we conclude that there was sufficient evidence, considered in the light most favorable to the government, to allow a rational conclusion by the jury that Davis was guilty beyond reasonable doubt. *United States v. Birges,* 723 F.2d 666, 672 (9th Cir.), *cert. denied,* 104 S.Ct. 1926 (1984). As to Count I, there was clearly enough evidence to establish the existence of a conspiracy, and under the "slight connection" rule, *see United States v. Dunn,* 564 F.2d 348, 357 (9th Cir. 1977), there was more than sufficient evidence to connect Davis, including his purchases of handguns, his delivery to Bridgeport, Bridgeport's naming of Davis, and Davis's own incredible explanation. As to Count 6, Davis's challenge is based on the lack of direct evidence of his having profited, but his profits could reasonably be inferred from the evidence of large volume and multiple transactions. Moreover, proof of the profit element could have been established by Davis's admission that he was paid $500 by a white man to buy the guns.

At trial, Davis did not object to the admission of Exhibits 50, 51, 52 and 53, the Thomasson testimony as to Davis's intention to retain counsel, the Owens Japanese Mafia testimony, or the Greenfield testimony. Because neither the failure to give limiting instructions, *United States v. Long,* 706 F.2d 1044, 1053 (9th Cir. 1983), nor the admission of this evidence, *United States v. Brock,* 667 F.2d 1311, 1317 (9th Cir. 1982), *cert. denied,* 460 U.S. 1022 (1983), constituted plain error, there is no basis for reversing the district court.

Davis also objects to admission of the hearsay testimony of co-conspirators, but the evidence was properly

admitted because all the requirements of Fed. R. Evid. 801(d)(2)(E) were met. Circumstantial evidence is sufficient to link Davis to the conspiracy. *United States v. Testa,* 548 F.2d 847, 852-53 (9th Cir. 1977).

Davis now objects to various jury instructions that were not objected to below. Because of the lack of objection, the plain error rule applies. *United States v. Moore,* 700 F.2d 535, 536 (9th Cir. 1983). We find no plain error in failure to give requested cautionary instruction on prior inconsistent statements or on the repetitious testimony by Thomasson.

Davis claims that he was denied effective assistance of counsel. Although his counsel did fail to object to various testimony and certain exhibits, we cannot say that he was not a reasonably competent advocate. *Cooper v. Fitzharris,* 586 F.2d 1325, 1330 (9th Cir. 1978), *cert. denied,* 440 U.S. 974 (1979). Davis's counsel did cross-examine witnesses, make objections, and make a closing argument to the jury. The objections he did not make might have been successful, but for the most part would only have resulted in cautionary instructions to the jury—a remedy that a reasonably competent attorney might conclude was not calculated to improve his client's chances with the jury. We are unable to determine "in light of all the circumstances, [that] the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland v. Washington,* 104 S.Ct. 2052, 2066 (1984).

Anthony Bridgeport's Convictions

Bridgeport also assigns multiple errors below. First he argues that agreements between the prosecution and

witnesses, exchanging leniency for truthful testimony, violated due process, but *United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984) (en banc), Bridgeport's only authority, involved plea bargains conditioned on results and not truth. *Id.* at 1531. Testimony about the contents of these agreements is not prosecutorial vouching for the truthfulness of the witness, and such agreements are properly admitted into evidence. *United States v. Robrer,* 708 F.2d 429, 432-33 (9th Cir. 1983).

Bridgeport argues that a variety of evidence—including the Japanese Mafia testimony, testimony as to Bridgeport's marijuana smoking, and as to Bridgeport's cohabitation with a person of a different race—should have been excluded as prejudicial. We review the trial court's decision under Fed. R. Evid. 403 for an abuse of discretion. *United States v. Rubio,* 727 F.2d 786, 798 (9th Cir. 1984). Although the Japanese Mafia testimony was not relevant and had some potential for prejudice, given the strong independent evidence against Bridgeport, any error that occurred was harmless.

Bridgeport objects to the prosecutor's comment in closing argument as to the source of the $13,900. Counsel have reasonably wide latitude in closing argument, *Birges* 723 F.2d at 671-72, and the prosecutor's comments were within the realm of fair inference.

Bridgeport now objects to failure to give Instruction No. 3 on witness credibility, but failed to object below. Bridgeport has failed to demonstrate that substantial rights of his were affected. *United States v. Patterson,* 678 F.2d 744, 774 (9th Cir. 1982), *cert. denied,* 459 U.S. 911 (1982).

Bridgeport contends that the district court should have declared a mistrial because of a conversation that took place between two government witnesses during a weekend hiatus in the trial. Because no showing of prejudice was made and because there was no abuse of discretion by the district court, the conversation between prosecution witnesses cannot serve as the basis for reversal. *United States v. Oropeza,* 564 F.2d 316, 326 (9th Cir., 1977), *cert. denied,* 434 U.S. 1080 (1978).

Finally, Bridgeport argues that Owens' reading of a corrected statement to the Grand Judy violates due process. Although we agree that the Grand Jury should have been informed that Owens was not reading his original statement, but a version that had been corrected to eliminate inconsistent statements, there was no violation of due process and it was not abuse of discretion for the district court to fail to use its supervisory power to correct and deter this mistake. *United States v. Ramirez,* 710 F.2d 535, 541 (9th Cir. 1983).

Therefore, the convictions of Davis and Bridgeport are AFFIRMED on all counts.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-1049
DC No. CR 83-230-TUC-RMB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIM DAVIS, JR.,

Defendant-Appellant.

NO. 84-1062
DC. No. CR 83-230-TUC-RMB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY JAMES BRIDGEPORT,

Defendant-Appellant.

O R D E R

(Filed July 30, 1985)

Before: FLETCHER, BOOCHEVER, and NORRIS, Circuit Judges.

The judges on the panel have unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.